SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1940

No.

COMPANIA ESPANOLA DE NAVEGACION MARITIME S.A. and COMPAGNIE GENERAL DE NAVIGATION A VAPEUR CYPRIAN FABRE
Petitioners

AGAINST

ROBERTO HERNANDEZ, INC.
Respondent

BRIEF IN SUPPORT OF PETITION

Jurisdiction is based on Sec. 240 of the Judicial Code.

FIRST POINT.

The Circuit Court of Appeals had no power to set aside the fact findings of the District Court, and its clear error in doing so calls for summary reversal of its decision.

R. S. 649 (28 U. S. C. 773) provides: "The findings of the court upon the facts, * * * shall have the same effect as the verdict of a Jury."

Under Rule 52 of the Rules of Civil Procedure fact findings are not to be set aside unless clearly erroneous (*i. e.* as matter of law), and due regard must be given to the opportunity of the Trial Court to judge of the credi-

bility of the witnesses. This rule made it beyond the competency of the Circuit Court of Appeals to review the evidence; the rule embodies what has long been the law. *State Farm Insurance Co.* v. *Coughran,* 303 U. S. 485, 487. The Circuit Court of Appeals disregarded this rule when it substituted its own views and those of the Maritime Commission for the findings of the District Court. The firmness of the rule against fact review by the Circuit Court of Appeals is well attested by this Court's decision in *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481-5.

The Circuit Court of Appeals gave undue effect to Section 30 of the Shipping Act 1916 (46 U. S. C. 829) which makes the findings of the Maritime Commission "*prima facie* evidence" of the facts therein stated. Sec. 30 does not make the Commission's findings *conclusive* even if supported by evidence or substantial evidence, as does the National Labor Relations Act (29 U. S. C. 160 (e)) and the Securities Exchange Act (15 U. S. C. 78 y). Review of Labor Board and Securities & Exchange Commission decisions is made by the Circuit Court of Appeals, whereas review of the Maritime Commission decisions, like those of the Interstate Commerce Commission, is made in the first instance by the District Court, which tries the case fully on the evidence like any other case not previously heard by the Commission—except for the rule of evidence making the Commission's findings *prima facie,* which means they would stand if no further evidence were presented in the District Court, *provided* they had the support of some evidence.

In the instant case no evidence was submitted by respondent or petitioners before the Maritime Commission

concerning avoidance of damages. That subject was fully litigated for the first time at the District Court trial, and it was on the evidence then submitted at initiative of petitioners that the District Court based its findings.

It was a further glaring disregard of Rule 52 that the Circuit Court of Appeals without any evidence whatsoever raised the point that other carriers might also have refused space to respondent. It should not be assumed that carriers would act unlawfully. *Cincinnati & Tex. Pac. Ry.* v. *Rankin*, 241 U. S. 319, 327.

SECOND POINT

Respondent's complete failure to avoid or mitigate damages foreclosed its claim against petitioners.

Respondent took no steps before the Commission to establish legal damages by showing either that it tried to secure transportation from others than the petitioners or that other means of transportation were not available. Legal damages do not accrue before the claimant establishes at least *prima facie* that he has no means of preventing or avoiding damages from breach of the alleged obligation. The authorities are positive that no damage accrues to him who does not take steps reasonably available to prevent them. See Williston on "Contracts" (1937 ed.) "Avoidable Consequences", vol. V Sec. 1353. Sec. 336 of "Restatement of the Law of Contracts". *Warren* v. *Stoddard*, 105 U. S. 224; *Grimwood* v. *Munson Line*, 273 Fed. 166, 167; *Cheatham* v. *Wheeling, etc. Co.*, 37 Fed. (2d) 593, 598; *The Oregon*, 55 Fed. 666, 673-4. *Fulton* v. *Canno*, 222 N. Y. 189.

At the trial in the District Court petitioners established by four highly qualified and disinterested shipping men that shipments could readily be and were being made to Bilbao over other routes (R. 23-41, 44-53). After analyzing the defects in the Commission's reasoning on damages, the District Judge said (R. 145):

"* * * There was no evidence adduced before the Commission nor in this suit to show that the plaintiff had endeavored to do so [avoid damages]. The defendants, on the other hand, did show that there was available a substitute service for the direct shipment from this country to Bilbao and that such transshipment via British or continental ports on through bills of lading was entirely feasible."

In *Hamilton* v. *McPherson*, 28 N. Y. 73 referred to by the Court (R. 163), the question of mitigation on proof "made by the defendants" had erroneously been taken from the jury. In the case at bar proof on mitigation was made by petitioners and the District Court found (equivalent to jury verdict) for them. That finding bound the Circuit Court of Appeals under Rule 52.

Filley v. *Pope*, 115 U. S. 213 and *Norrington* v. *Wright*, 115 U. S. 188 relied on by the Court were not relevant. Those cases involved breach of warranties in *sales* contracts, the first as to time of shipment, and the second as to place of shipment. The case at bar did not involve a warranty at all, but only damages sought for breach of a transportation obligation, to which ordinary rules of damage apply. If de Bareno desired cars to arrive at Bilbao there was no reason to assume, without proof on the point, that said usual articles of trade would not be as acceptable to him arriving by one route as another. The March 31, 1934 contract with the Conference lines distinctly contemplated alternative routes.

THIRD POINT

The Circuit Court of Appeals misapplied the law as to special damages.

Although right of action is asserted under Sec. 14 of the Shipping Act, 1916 (46 U. S. C. 812), respondent's real action was either for a tortious refusal to supply space in violation of petitioners' common law duties, or for breach of their March 31, 1934 contract with the respondent (R. 112-16). All of the damages claimed are special damages arising out of a contract with a third party, *i. e.*, the commission "contract" between Hernandez and de Bareno. No sufficient basis existed for finding special damages. See *Globe Ref. Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540, 544-5; *Mitsubishi* v. *Davis*, 291 Fed. 882, 885, aff'd 291 Fed. 57; *Czarnikow-Rionda Co.* v. *Federal S. R. Co.*, 255 N. Y. 33, 41; *Horne* v. *Midland Ry. Co.*, 8 C. P. 131.

Assuming the utmost for the evidence and the contentions made thereon, special damages (lost commission on sale) were not justified because:

1. It did not follow and could not legally be assumed that de Bareno would not accept shipments made over other than Conference lines when space on Conference lines was not available.

2. There was nothing to indicate that lines other than Conference Lines would not accept cars and transport them in regular course, and the Circuit Court of Appeals' suggestion in this regard is speculation only.

3. There is nothing to show that any of the several Conference lines was apprised of the refusal of any other

Conference line to accept shipments, and there was no reason for any line to assume such refusal.

4. There was no evidence either before the Maritime Commission or before the District Court that Arnold Bernstein Company was advised at any time that the contract provided that shipments must be made via Conference lines. Such a showing would be important as concerns the joint and several liability which was imposed below.

FOURTH POINT

The Circuit Court of Appeals erred in imposing joint and several liability.

There is not the slightest evidence in the record of any conspiracy on the part of the three lines or of any basis upon which a joint and several liability could properly be imposed. The refusals of the several lines to furnish space were several refusals, notwithstanding their membership in a Conference (R. 34-5) approved under Sec. 15 of the Shipping Act (46 U. S. C. 814). Their only conference activity with respect to the matter at bar was a minute in a Conference meeting quoting a cable which stated that the Shipping Board had ruled the lines could not refuse contracts or shipments (R. 96). This was sent June 14, 1934, in reply to a cable of June 9, both cables being before respondent was in a position to tender any cars for shipment, and unrelated to any representation by respondent. The "contract" with de Bareno was not made until June 24, 1934. This does not support, but denies, a combined effort on the part of the Conference to prevent respondent from obtaining space on Conference lines.

Sec. 15 of the Shipping Act merely permits agreements between competing carriers for the purpose of regulating competition between lines, and when approved by the Maritime Commission they are exempt from the provisions of the Sherman Anti-Trust Act. There is nothing in that Section, nor in the Conference agreement itself, which in any way makes one carrier responsible for the fault of another carrier, and such an interpretation and application should be avoided.

This question is of general commercial inportance, and of particular importance in this case in view of the fact that Arnold Bernstein Company has been liquidated (R. 35) and is not a party to the court proceedings although plaintiff seeks to hold the other lines for its refusals.

FIFTH POINT.

The Maritime Commission had no jurisdiction of the proceeding brought before it.

Notwithstanding that the complaint to the Maritime Commission, as well as in the District Court, charged discrimination under Sec. 14 of the Shipping Act, 1916, (46 U. S. C. 812) its real basis was that petitioners had wholly failed and refused to perform their lawful common carrier functions in respect to the transportation of unboxed automobiles to Bilbao, Spain. It was immaterial to respondent whether those functions were performed for others. The respondent had immediate recourse to the District Court for any legal damages, as the facts alleged did not require or justify invoking any regulatory or other process of the Maritime Administrative Commission.

Respondent was concerned only as a broker for a commission, was not the owner of the cars, and was not in position to be discriminated against in any sense contemplated by the Shipping Act.

The question presented on the claim was a simple question of fact on the merits of the case with mixed questions of fact and law as to the damages, if damages followed. There was nothing in the nature of the case which required the special knowledge and facilities of an administrative body. On the contrary, the questions raised were distinctly such as would ordinarily be passed upon by the Court. Under the decisions such controversies should go to the court in the first instance, *L. & N. R.R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70; *Powers* v. *Cady*, 9 F. (2d) 458; *Hines* v. *Henaghan*, 265 Fed. 831; *Royal Brewing Co.* v. *M. K. & T. Ry. Co.*, 217 Fed. 146; *Danciger* v. *Wells Fargo & Co.*, 154 Fed. 379.

The Circuit Court of Appeals in holding that the Maritime Commission had jurisdiction, relied upon the decision of this court in *United States Navigation Co.* v. *Cunard*, 284 U. S. 474. But that decision only required submission to the Maritime Commission of such controversies as involved "technical and intricate matters of fact" where "solution of the question would demand sound administrative discretion" where "accomplishment of the purposes of Congress could not be had without the comprehensive study of an expert body continuously employed in administrative supervision" whereby "could there be secured the uniformity of ruling upon which appropriate protection from unreasonable exactions and unjust discriminations must depend" (284 U. S. 482-3).

The Shipping Act gives no election to proceed either in court or before the Maritime Commission such as exists under Sec. 9 of the Interstate Commerce Act (49 U. S. C. 9).

LAST POINT

It is respectfully submitted that the writ should be granted and that the decision of the Circuit Court of Appeals be reversed.

BURTON H. WHITE
ROSCOE H. HUPPER
Counsel for Petitioners

New York City
April 18, 1941